90-39

Supreme Court, U.S.
FILED
JUN 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD C. FRAZIER,
Petitioner

v.

THE STATE OF OHIO
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE COURT OF APPEALS FOR THE NINTH JUDICIAL DISTRICT MEDINA COUNTY, OHIO

MARCO & MARCO, L.P.C.
RICHARD J. MARCO
ATTORNEY FOR PETITIONER
OHIO ATTORNEY NO. 0015118
52 PUBLIC SQUARE
MEDINA, OHIO 44256
(216) 725-0030

QUESTIONS PRESENTED FOR REVIEW

Whether a state court may, consistent with the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, compel a defendant in a criminal proceeding to submit to a blood test designed for DNA testing procedures when the trial court has no evidence before it to find that the DNA testing procedures will result in the finding of evidence relevant to the guilt or innocence of the accused or that the procedures to be employed are able to produce the proffered effect.

PARTIES

The parties to the proceedings are set forth as follows:

Richard C. Frazier

and

the State of Ohio.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD C. FRAZIER,
Petitioners

THE STATE OF OHIO
Respondent

Petition For a Writ of Certiorari
to the Supreme Court of Ohio and
The Court of Appeals For The
Ninth Judicial District
Medina, County, Ohio

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the Court of Appeals for the Ninth Judicial

District, Medina County, Ohio, are unreported and are appended hereto, marked as Appendix "C" and "D". The Judgment Entry of the Ohio State Supreme Court denying petitioner's motion to certify the record is also unpublished and is appended hereto, marked as Appendix "B".

JURISDICTION

The Judgment of the Supreme Court of the State of Ohio was entered on March 18, 1990. The Notice of Appeal to this Honorable Court was filed on the 29th day of May, 1990. Said Notice of Appeal was timely filed. Jurisdiction of this matter is claimed under 28 United States Code Section 1257, subsection (3).

CONSTITUTIONAL PROVISIONS AND STATUTE

The instant petition involves review and interpretation of the following constitutional provisions. The Ohio Statutes included herein are informational insofar as they are the crimes with which petitioner has been charged and are provided for herein for informa-

tional purposes.

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law, nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE SECTION 2907.02(A)(1)(b)

No person shall engage in sexual conduct with another who is not the spouse of the offender but is living separate and apart from the offender, when either of the following apply:

* * *

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

OHIO REVISED CODE SECTION 2907.02(A)(2)

No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

OHIO REVISED CODE SECTION 2907.05(A)(3)

No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

* * *

(3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows

the age of such person.

OHIO REVISED CODE SECTION 2907.03(A)(5)

No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

***

(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis.

STATEMENT OF THE CASE AND FACT

During its term commencing October 4, 1988, a Grand Jury for the County of Medina, State of Ohio, indicted petitioner for alleged violations of Ohio Revised Code Sections 2907.02(A)(1)(b) and 2907.02(A)(2), Rape; 2907.05(A)(3), Gross Sexual Imposition; and 2907.03(A)(5), Sexual Battery.

On August 28, 1989, a hearing was held before the Honorable Judith A. Cross, Judge of the Court of Common Pleas, Medina

County, Ohio. The motion hearing was upon the application of the State of Ohio. The State was requesting a court order compelling petitioner to submit to the withdrawal of blood from his body. The State contended that, without evidence, the blood was to be withdrawn for DNA analysis. The analysis was to determine the paternity of a child conceived of the alleged rape. The Court of Common Pleas is currently possessed of the record of this hearing.

In any event, the State produced no evidence as to the efficacy of the procedure desired by the State. In fact, no procedure was presented to the Court. The Court had before it only a determination that the State desired petitioner's blood. The Court, through a Journal Entry (See Appendix "E") granted the State's motion and ordered a blood sample be taken from petitioner for DNA analysis. She further ordered that a separate sample be set aside for petitioner's "own submission or analysis."

On August 30, 1989, the then counsel for petitioner filed a Motion to Stay the Taking of a Blood Sample in the Court of Appeals for the Ninth Judicial District, Medina County, Ohio.

The State of Ohio moved the appellate court to dismiss petitioner's appeal. The appellate court agreed with the State's argument that the trial court's order did not amount to a final appealable order. Petitioner's counsel filed a motion for reconsideration, which was denied by the appellate court on November 28, 1989.

Thereafter, on December 5, 1989, petitioner, through his counsel, filed a Notice of Appeal to the Supreme Court of the State of Ohio alleging the case involved issues of public and general interest as well as involving substantial constitutional questions. The issues were briefed and, on March 18, 1990, the Supreme Court of Ohio, through an entry dated March 18, 1990, refused to certify the record stating that no substantial constitutional question existed.

Petitioner is now before this Honorable Court praying that it review the aforementioned judgments of the courts of the State of Ohio.

STAGE IN THE PROCEEDINGS WHERE THE FEDERAL QUESTIONS WERE RAISED

Since the date of the trial court's order compelling petitioner to submit to a blood test, he has, through his previous counsel, raised objections based upon the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. At each stage, petitioner's arguments were overruled without opinion, explanation or reference.

ARGUMENT

INTRODUCTION

In the lower courts, counsel for petitioner made arguments concerning the viability of the trial court's order based upon its repugnance to both the Fourth and Fifth Amendments to the Constitution of the United States. In each instance, his arguments were met with silence. For purposes of this petition, the arguments regarding the Fifth Amendment will be left aside.This petition will, on the other hand, explain and amplify the Fourth Amendment arguments.

As a final note, petitioner asserts that, contrary to the finding of the Ninth District Court of Appeals, the trial court's order compelling petitioner to submit to a blood test is a final appealable order. Once blood is drawn, the invasion is complete and irreversible.

FOURTH AMENDMENT ARGUMENT

Petitioner's argument, should this Court accept certiorari in this matter, is very straightforward. A trial court cannot, consistent with the Fourth Amendment, compel a criminal defendant to submit to the withdrawal of his blood, without some evidence before it that indicates analysis of the blood will lead to admissible evidence.

Again, for purposes of this petition, petitioner would point to a single case out of this Court which seems to encompass much of the thought on this area of the law. That is *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985).

The facts of *Winston* were that an individual, the defendant therein, armed with a gun, attempted to rob a shopkeeper. Appar-

ently, a shootout ensued between the offender and the shopkeeper, the shopkeeper being a good enough shot to cause a bullet to be lodged in the assailant's left chest area. Some eight blocks from where the shooting occurred, the soon-to-be defendant presented himself to a hospital complaining of a gunshot wound to his chest. The victim was brought to the hospital and identified the patient as his assailant.

Naturally, the prosecution believed that if it could obtain the bullet from the accused's chest, it would, by comparison to the shopkeeper's gun, conclusively establish his presence at the time of the alleged robbery. So, the prosecution filed a motion to compel the defendant to submit to a surgical procedure which would remove the bullet from the accused's chest.

Just as naturally, the defendant resisted this intrusion into his body by the State. As it turned out, the surgical procedure to remove these bullet fragments was more complex than originally put forth by the prosecutor. Eventually, this Court upheld the lower court's decisions enjoining the threatened surgery.

The Court, in an opinion written by Justice Brennan, held that

the contemplated surgery was an unreasonable search and seizure under the Fourth Amendment. The Court reached this holding by applying the balancing test enunciated in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 908 (1966). This test consists of three parts, according to the *Winston* court. They are:

1) Reasonableness. What is the extent to which the contemplated procedure may threaten the safety or health of an individual;

2) The Extent of the Intrusion. What is the extent of intrusion upon which the individual's dignitary interests in personal privacy and bodily integrity; and

3) State's Interest. Has the State demonstrated a compelling interest justifying the intrusion.
Winston v. Lee, 470 U.S. at 761, 765.

It is absolutely essential that this analysis be completed prior to sticking the needle into petitioner's arm. Once the needle has been inserted, the invasion of petitioner's body and the violation of his Fourth Amendment rights are complete. Although not emphatically stated in either the *Winston* or *Schmerber* cases, it is definitely

implied.

In *Schmerber*, this Court stated that:

> The overriding function of the Fourth Amendment is to protect personal privacy and dignity from unwarranted intrusion by the State ...
>
> * * *
>
> The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great. *Schmerber v. California*, 384 U.S. at 767, 770. (emphasis added).

This language was quoted with approval in *Winston v. Lee*, 470 U.S. at 760, 761. To give any import, then, to the proscribed analysis in *Schmerber* and *Winston*, the trial court must conduct this hearing prior to the invasion of the defendant's body. That is exactly what is lacking in the instant case. The hearing through which the trial court ordered petitioner to submit to the blood test consisted of prior counsel's arguments. No evidence was put forth by the State. There was nothing, other than the prosecution's assertions, upon which the trial court could make an "informed, detached and deliberate determination." For example, in *Schmer-*

ber this Court was dealing with an issue similar to the one at bar in that the procedure employed by the State was withdrawal of blood with a needle. However, the *Schmerber* Court was in a position to note that "[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol." 384 U.S. at 771. In this case, there is nothing before the court to determine the efficacy of the State's contemplated procedure. Certainly, there was nothing before the trial court which would indicate that DNA testing is anything but the controversial subject it is.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests this Honorable Court to issue a writ of certiorari in this cause.

Respectfully submitted,
MARCO & MARCO, L.P.C.

Richard J. Marco
Attorney for Petitioner
Ohio Atty. No. 0015118
52 Public Square
Medina, Ohio 44255
(216) 725-0030

APPENDIX "A"

Date Filed: May 29, 1990

IN THE SUPREME COURT
FOR THE STATE OF OHIO

STATE OF OHIO	CASE NO. 90-17
Plaintiff-Appellee	
vs.	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
RICHARD C. FRAZIER	
Defendant-Appellant	

Now comes defendant-appellant herein, Richard C. Frazier, and hereby gives notice of his intention to appeal this Honorable Court's Judgment Entry dated March 18, 1990, overruling appellant's Motion For Leave to Appeal.

MARCO & MARCO, L.P.C.

/s/ Richard J. Marco
Richard J. Marco
Attorney for
Defendant-Appellant
Ohio Attorney No. 0015118
52 Public Square
Medina, Ohio 44256
(216) 725-0030

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was this 25th day of May, 1990, served on Dean Holman, Medina County Prosecuting Attorney, 135 S. Jefferson St., Medina, OH 44256, by regular U.S. mail.

/s/ Richard J. Marco
Richard J. Marco
Attorney for
Defendant-Appellant

APPENDIX "B"

Date Filed: March 18, 1990

IN THE SUPREME COURT OF OHIO

1990 TERM
To wit: March 18, 1990

State of Ohio
Appellee
vs.
RICHARD C. FRAZIER
Appellant

Case No. 90-17
ENTRY

Upon consideration of the motion for leave to appeal from the Court of Appeals for Medina County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COST:

Motion Fee, Affidavit of Poverty filed.

(Court of Appeals No. 1842)

/s/ Thomas J. Moyer
Thomas J. Moyer
Chief Justice

APPENDIX "C"

Date filed: October 2, 1989

STATE OF OHIO	)	IN THE COURT OF APPEALS
	) SS	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	
STATE OF OHIO	)	C.A. NO. 1842
	)	
Plaintiff-Appellee	)	
	)	
v.	)	
	)	
RICHARD FRAZIER	)	
	)	
Defendant-Appellant	)	JOURNAL ENTRY

This case was heard upon the motion of appellee, the State of Ohio, to dismiss the within appeal for lack of a final appealable order as defined in R.C. 2505.02. Appellant has not responded.

Upon consideration thereof, the Court finds that appellant, Richard Frazier, is appealing from the trial court's order requiring appellant to provide the trial court with a blood sample for DNA analysis. This order does not affect a substantial right, determine the action or prevent a judgement as required by R.C. 2505.02.

Accordingly, appellee's motion is well taken. Therefore, the appeal is dismissed.

/s/ D.B. Quillin
Judge

/s/ Mary Cacioppo
Judge

Exhibit C

_____
Judge

cc: John J. Dolatowski, Asst. Prosecutor, 135 S. Jefferson St., Medina, OH 44256 for Plantiff

Edmond F. Bowers, Attorney at Law, One Park Centre, Suite 104, Wadsworth, OH 44281 for Defendant

APPENDIX "D"

Date filed: November 28, 1989

STATE OF OHIO	)	IN THE COURT OF APPEALS
	) SS	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	
STATE OF OHIO	)	C.A. NO. 1842
	)	
Plaintiff-Appellee	)	
	)	
v.	)	
	)	
RICHARD FRAZIER	)	
	)	
Defendant-Appellant	)	JOURNAL ENTRY

This case was heard upon the motion of appellant, Richard Frazier, for leave to file his motion for reconsideration of the journal entry dated October 2, 1989, instanter.

Upon consideration thereof, the Court finds the motion is untimely, however, in the interest of justice, we will grant appellant leave to file his motion for reconsideration.

The journal entry dated October 2, 1989, dismissed appellant's appeal of the trial court's order requiring appellant to submit to a blood sample for DNA testing for lack of a final appealable order.

Appellant bases his ~~motion~~ on the case of State v. Biddings (Oct. 14, 1988), Franklin App. No. 86AP-910, unreported. Unlike Biddings, we are confronted with an objection to the use of the blood sample's results, not with an objection to the mere taking of a blood sample which is in violation of an appellant's religious beliefs; thus appellant's motion for reconsideration is not well taken.

Accordingly, appellant's motion is denied.

/s/ D.B. Quillin
Judge

/s/ Mary Cacioppo
Judge

cc: Mary Ann Kovack, Asst. Prosecutor, 135 S. Jefferson St., Medina, OH 44256 for Plantiff

---

Edmond F. Bowers, Attorney at Law, One Park Centre, Suite 104, Wadsworth, OH 44281 for Defendant

---

JUL 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-39

IN THE

Supreme Court of the United States

October Term, 1989

RICHARD C. FRAZIER,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DEAN HOLMAN
Medina County Prosecutor
Counsel of Record
135 South Jefferson Street
Medina, Ohio 44256
(216) 723-9536
Attorney for Respondent

JOHN J. DOLATOWSKI
Medina County Assistant Prosecutor

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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No. 90-39

IN THE

Supreme Court of the United States

October Term, 1989

RICHARD C. FRAZIER,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On October 13, 1988, petitioner was indicted by a Medina County Grand Jury for two counts of rape, in violation of Ohio Revised Code 2907.02, one count of gross sexual imposition, in violation of Ohio Revised Code 2907.05, and sexual battery, in violation of Ohio Revised Code 2907.03. The charges arose as a result of the petitioner allegedly compelling his minor step-daughter to engage in various sexual conduct and sexual contact. Based upon the fact that the victim/step-daughter had a child in 1988 which may have been fathered by the petitioner, the State of Ohio sought to have a blood sample taken for the purpose of D.N.A. analysis. After a hearing was held on the issue, the trial court judge ordered that the blood sample be taken (Appendix A).

Petitioner filed a notice of appeal from that order to the Ninth District Court of Appeals, Medina County, Ohio. The State of Ohio filed a motion to dismiss the appeal as not affecting a substantial right and, therefore, not a final appealable order pursuant to Ohio Revised Code 2505.02. The appeals court agreed and the appeal was dismissed (Petitioner's Appendix C). A motion for reconsideration of that decision was also denied (Petitioner's Appendix D).

Thereafter, an appeal was taken to the Ohio Supreme Court, with memoranda filed in support of and opposing jurisdiction. That appeal was dismissed sua sponte "for the reason that no substantial constitutional question exists therein" (Petitioner's Appendix B). The matter is now before this court upon petitioner's assertion that the withdrawal of a blood sample is an unreasonable search and seizure in violation of the Fourth Amendment.

REASONS WHY PETITION SHOULD BE DENIED

Petitioner's writ should be denied because petitioner has not asserted any of the following:

That the decision rendered in this case was made by a federal court of appeals which is in conflict with another federal court of appeals or with a state court of last resort, or that the decision so far departed from the accepted and usual course of judicial proceedings;

That the decision rendered in this case involves a federal question in a way which conflicts with the decision of another state court of last resort or a federal court of appeals;

That the decision rendered in this case involves an important question of federal law which has not been settled by this court or in a way which conflicts with applicable decisions of this court.

That the decision rendered in this case involves a federal question in a way which conflicts with the decision of another state court of last resort or a federal court of appeals;

That the decision rendered in this case involves an important question of federal law which has not been settled by this court or in a way which conflicts with applicable decisions of this court.

Petitioner's argument has shifted somewhat from an alleged claim that the mere taking of a blood sample would violate his privilege against self-incrimination, as protected by the Fifth Amendment, to an alleged illegal seizure proscribed by the Fourth Amendment.

This Court has held that the Fifth Amendment privilege against self-incrimination, as made applicable upon the states by the Fourteenth Amendment, protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis thereof does not involve compulsion to these ends. Likewise, the Court has recognized that the systematized or scientific analyses of the accused's fingerprints, *blood samples*, clothing, hair, and the like, could not be properly characterized as critical stages of the prosecution at which the accused even has the right to the presence of his counsel. *Schmerber v. California*, 384 U.S. 747, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

In *Ohio v. Biddings* (October 14, 1988), Franklin County App. No. 88 AP-910,[1] the court recognized that the mere taking of an accused's blood sample may affect a "substantial right" because it could violate the constitutional right of religious freedom. Hence, such an order is subject to appellate review as a final appealable order. However, petitioner has made no assertion that the taking of his blood sample would violate his religious freedom. Instead, his Fifth Amendment argument hinges upon the prospective use of the sample's results as a violation of his right against self-incrimination. *Biddings*

[1] Appendix B.

acknowledges that this question concerned the admissibility of the sample's results, but was not a final appealable order. Accordingly, the mere taking of petitioner's blood sample for the purpose of D.N.A. analysis is no different than fingerprints, clothing, hair, etc., and has no Fifth Amendment implications.

Turning to petitioner's claim that the mere taking of a blood sample would violate his Fourth Amendment right to be free from unreasonable searches and seizures, he cites this Court's three part test enunciated in *Winston v. Lee,* 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985). In balancing those three factors, it becomes clear that the withdrawal of blood is a reasonable intrusion which would not threaten the safety or health of the petitioner. The extent of the intrusion is minimal and does not involve the administration of general anesthesia or an incision beneath the skin. Consequently, there is no significant health threat in the withdrawal of blood. Finally, the state has a compelling interest to justify taking petitioner's blood sample. The results of the analysis may conclusively establish the fact that petitioner had sexual intercourse with his minor step-daughter at a certain period in her life. While such evidence is no doubt damaging to the petitioner, it is nonetheless reasonable under the Fourth Amendment.

The state contends that the standard for review in this case is no different than any other case involving a search or seizure. That is, whether there is probable cause to believe that evidence may be found, the petitioner's reasonable expectation of privacy, and the state's compelling need to obtain the evidence. In balancing those considerations, the trial court properly ordered the blood sample in question. The merits of D.N.A. testing are irrelevant to the constitutional issues presented by the petitioner.

CONCLUSION

For the reasons expressed above, the State of Ohio respectfully opposes petitioner's writ of certiorari and requests that it be denied.

Respectfully submitted,

DEAN HOLMAN
Medina County Prosecutor
Counsel of Record
135 South Jefferson Street
Medina, Ohio 44256
(216) 723-9536
Attorney for Respondent

JOHN J. DOLATOWSKI
Medina County Assistant Prosecutor

APPENDIX A

JOURNAL ENTRY
OHIO COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS

MEDINA COUNTY, OHIO

CASE NO. 9323

STATE OF OHIO,
Plaintiff,

vs.

RICHARD FRAZIER,
Defendant.

JOURNAL ENTRY

JUDGE JUDITH A. CROSS

This matter came on for hearing on the State's motion for a blood sample on August 28, 1989, before the Honorable Judith A. Cross, Judge of the Court of Common Pleas, Medina County. The Prosecuting Attorney was in court on behalf of the State of Ohio and the Defendant was in court and represented by Edmond F. Bowers.

The Court heard all the arguments of counsels and orders a blood sample be taken for DNA analysis. Also an additional or separate sample be set aside for defendant to use for his own submission or analysis.

IT IS SO ORDERED.

JUDGE JUDITH A. CROSS

COMMON PLEAS COURT
89 SEP 3 AM 11:29
FILED
JEAN WATERS
MEDINA COUNTY
CLERK OF COURTS

APPENDIX B

OPINION
OHIO COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

No. 88AP-910
(ACCELERATED CALENDAR)

STATE OF OHIO,
Plaintiff-Appellee,

v.

ROBERT BIDDINGS,
Defendant-Appellant.

OPINION

Rendered on October 14, 1988

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. ALAN C. TRAVIS, for appellee.

MR. JAMES KURA, Public Defender and MS. BARBARA J. SLUTSKY, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

MCCORMAC, *J.*

Robert Biddings, defendant-appellant, appeals the trial court's order requiring the taking of his blood to have it tested for DNA and compared to samples taken from rape victims. Defendant contends that the trial

court's order is a final appealable order and that the order deprives him of his individual freedom to practice his religion as guaranteed by the First and Fourteenth Amendments of the United States Constitution, and Section 7, Article I of the Ohio Constitution.

The first issue is whether the order of the trial court, refusing to quash the search warrant which permits the state to take a blood sample from the person of defendant, is a final appealable order. In deciding this question, we note that the issue is not the admissibility of evidence obtained as a result of the execution of the search warrant but, instead, whether defendant's constitutional rights to freedom of religion will be violated by the mere taking of a blood sample from him. If the question were solely the admissibility of the evidence, the order of the trial court would not be appealable at this stage since there would be adequate opportunities for defendant to contest any ruling concerning the use of the evidence after conviction. However, the contention of defendant is that the mere taking of the samples constitutes the violation of his religious freedom rather than any use that may be made of the samples. Hence, if that were true, no later appeal would be effective to remedy the violation that had already taken place.

R.C. 2505.02 defines a final order as "*** an order that affects a substantial right made in a special proceeding ***." Defendant has a substantial as well as a constitutional right to practice his religion according to his tenets and not to have the state violate those rights. See *In re Milton* (1987), 29 Ohio St. 3d 20. To determine whether an order was issued in a special proceeding, we must weigh the harm to the prompt and orderly disposition of the litigation and the waste of judicial

resources because of possible multiple appeals against the need for immediate review because an appeal after final judgment is not practical. See *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253. As previously noted, there is no effective way to remedy a violation of defendant's freedom to practice his religion without government intervention if the violation has irreparably taken place prior to an opportunity to appeal. Hence, applying the *Amato* balancing test, we find that there is a final appealable order of the issue of whether defendant has demonstrated that the execution of the search warrant will violate his constitutional right of religious freedom.

The state may obtain blood from a defendant by execution of a search warrant against the defendant's wishes where there is probable cause to believe that evidence relating to a crime will be found therein. *Schmerber v. California* (1966), 384 U.S. 757. Hence, facially the search warrant is valid as the affidavit upon which it is based states ample grounds for a reasonable magistrate to believe that the blood sample taken from defendant may produce evidence of a crime. In regard to the facial validity of the search warrant, it is not significant that there may be other methods by which evidence of a crime may be found. However, defendant asserts a matter not asserted in *Schmerber* which is that the mere taking of the blood sample would cause a violation of his religious belief and the freedom to practice his religion as he sees fit. The trial court scheduled a hearing to consider this matter. Although the defendant argued that the state had the burden to proceed, the state's burden was fulfilled by the showing that the search warrant complied with the dictates of *Schmerber*. The state was not required to prove that the taking of the blood samples would not interfere with

defendant's right to practice his religion. Indeed the state has no knowledge of defendant's subjective religious belief. Thus, the defendant had the burden to show that the taking of the blood sample would violate his religious belief.

The defendant waived his right to be at the hearing and he did not testify. There was no testimony adduced at the hearing but only statements of counsel. It appears that there was an agreement that defendant is a member of the Jehovah's Witnesses, although he may not be active in that church at this time. It was also conceded that the Jehovah's Witness faith does not prohibit the taking of a blood sample. Hence, there was no necessity of evidence concerning these two matters. The issue then revolved around whether a person's individual religious belief, false or true, that is in complete odds with the beliefs held by the majority, if not all, of his religious order is sufficient to give rise to a constitutional right to practice his religion, if his views are sincerely held rather than merely being used as a ruse to avoid some undesirable consequence of actions proposed to be taken against him.

The case law supports the proposition that an honestly held religious belief, even one at odds with the majority or all of the members of the religious organization to which the person belongs, is entitled to constitutional protection. See *Thomas v. Review Bd. of Indiana Employment Security Div.* (1981), 450 U.S. 707; *Bacher v. North Ridgeville* (1975), 47 Ohio App. 2d 164. Thus, if defendant proved that he had an honestly held religious belief that prohibited the taking of blood samples from him, that belief is entitled to constitutional protection without inquiry into the truth of falsity of his view or whether he has correctly interpreted the Bible.

The defendant did not prove that he had an honestly held religious view that prohibited the taking of blood samples from him. He did not testify at the hearing; the only "evidence" at the hearing was counsel's statement that he had that view. Counsel's statements are not sufficient to carry defendant's burden in this regard where defendant choose not to place his credibility in issue by being subject to cross-examination. His claimed beliefs are suspect since they appear to be at complete variance with the religious order to which he claims to belong and there is a strong self-serving motivation to prevent the state from obtaining what might be the strongest possible evidence to convict him of numerous crimes. Thus, the trial court did not err in refusing to quash the search warrant because defendant failed to carry his burden to show that he had an honest belief that taking blood from him would violate his religious principles.

Following the trial court's determination, an affidavit was submitted by defendant that, in a conclusionary fashion, stated that he was religiously opposed to the taking of blood based on Genesis 9:5, 6 and that he had no religious objections to the taking of other physical samples. However, that affidavit was not properly before the trial court nor is it the basis for finding that the trial court erred in failing to set aside the search warrant. Defendant was not under cross-examination and subject to a determination of whether his claimed religious beliefs were honestly held.

The inquiry is not over even if an honestly held religious belief against certain state action is proved. The First Amendment to the United States Constitution, which guarantees the freedom of religion, encompasses two aspects: the freedom to believe and the freedom to

act. The freedom to believe is absolute, but the freedom to act is not. One's relation to God and the obligations that he may believe that they impose and the manner in which he expresses those beliefs cannot be interferred with provided that there is no interference with the morals of the people and the laws of society designed to secure us peace and prosperity. *United States v. Ballard* (1944), 322 U.S. 78.

Applying the *Ballard* principles, courts have held that blood tests may be ordered against claims of personal religious beliefs when the state has a compelling and paramount interest. Generally the cases in which that doctrine has been applied involved paternity proceedings. See Annotation (1985), 37 A.L.R. 4th 167; Annotation (1956), 46 A.L.R. 2d 1000, Section 6d supplement. See, also, *State v. Meachum* (Wash. 1980), 612 P.2d 795; *In the Matter of Martinez v. Anthony D.* (1983), 466 N.Y.S. 2d 194.

Even if we accept defendant's belated affidavit as evidence of his honestly held religious belief, that personally held viewpoint is insufficient to override the compelling state interest involved. The interest of the state in obtaining evidence to prove that defendant was involved in rape and other crimes of violence is great. There may even be a future interest of the victims to know who the perpetrator was given the latent possibility of disease that may stem from this type of contact. Certainly the state interest is at least as great as the interest of the state and the parties in determining the paternity of a child.

Defendant argues that DNA fingerprinting may be obtained by less intrusive ways that do not violate defendant's religious beliefs, such as use of other body tissues and fluids other than blood. The only evidence pertaining to this issue is the materials issued by Cellmark Diagnostic, the laboratory that was to perform the tests, which state that DNA fingerprinting can be accomplished from semen and other DNA bearing cells, as well as with blood. The record does not demonstrate whether DNA fingerprinting with blood is better or the same as can be accomplished with the use of other tissues or fluids, or whether the acceptability into evidence of DNA fingerprinting with blood is more likely than with other fluids. Expert testimony would be needed to show that effective, less intrusive means, are available. The unsworn and inconclusive brochure of Cellmark is insufficient for this purpose.

The trial court did not err in refusing to suppress the search warrant. Since the trial court has not placed an order on the record reflecting that ruling, that order should be entered immediately to make this appeal mature. This court's temporary stay of execution of the search warrant to resolve these important issues on appeal is dissolved, effective with entry of judgment. The trial court may order execution of the search warrant forthwith.

Judgment affirmed; stay of execution dissolved.

REILLY and BOWMAN, *JJ.*, concur.